Supreme Court, U.S.
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No. 97-1181

In The

Supreme Court of the United States

October Term, 1997

RICHARD M. PARKER, *et al.*,

Petitioners,

v.

DAVID S. WAKELIN, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a statute establishing a state retirement system should be found to create binding contract rights, thus limiting future statutory amendments, absent a clear indication that the legislature intended to bind itself contractually.

2. Whether the unmistakability doctrine is applicable to a state's exercise of its legislative power to amend an existing statute establishing a state retirement system.

PARTIES

The list of parties contained in the petition should be amended to reflect that two of the respondents have been replaced since the commencement of this action. Respondent Claude Perrier, sued in his capacity as Executive Director of the Maine State Retirement System, has been succeeded by Kay R.H. Evans. Respondent William C. Bullock, Jr. has been succeeded as a trustee of the Maine State Retirement System by Peter Leslie. Ms. Evans and Mr. Leslie should therefore be substituted as respondents pursuant to Sup.Ct. Rule 40.3.

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BRIEF IN OPPOSITION

Respondents David S. Wakelin, Kay R.H. Evans, John M. Kimball, Peter Leslie, George A. Burgoyne, Eunice Cotton, Charles M. Jackson, Grover B. MacLaughlin, and the Maine State Retirement System respectfully request that this Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the First Circuit in the above – captioned case. The First Circuit's opinion is reported at 123 F.3d 1 and reprinted in the Appendix to the Petition for Certiorari ("Pet. App.") at 1a-17a.

STATEMENT OF THE CASE

1. The Maine State Retirement System

This case involves the constitutionality of certain amendments made by the Maine Legislature in 1993 to the statutes governing the Maine State Retirement System ("MSRS").

The Maine State Retirement System was originally established by statute in 1942, and public school teachers were included within the system five years later. Under the applicable statutes, which are codified at 5 M.R.S.A. §§ 17001-18806 (1989 and Supp. 1997), the MSRS is funded by mandatory contributions from both the members of the System and from the State. In view of Maine's longstanding tradition of financial support for primary and secondary education, the employer contribution for public school teacher retirement is paid, not by the local school districts who employ the teachers, but by the State

Legislature through biennial appropriations. *See* 5 M.R.S.A. § 17153.

Members of the MSRS qualify to receive retirement benefits upon (1) reaching the statutory retirement age and (2) satisfying a years of service requirement (for members still in service, at least one year of service prior to retirement; for members no longer in service, at least 10 years of creditable service). 5 M.R.S.A. §§ 17851(1)-17851(2-A). Eligible retirees receive a retirement benefit equalling two percent of the retiree's "average final compensation" multiplied by the number of years of creditable service. 5 M.R.S.A. § 17852. Alternatively, a member becomes eligible to receive retirement benefits immediately regardless of age if he or she retires with at least 25 years of creditable service. 5 M.R.S.A. § 17851(3). In that case, however, the amount of the benefit is reduced by an early retirement penalty constituting a specified percentage for each year that the retiree's age at retirement is less than the statutory retirement age. 5 M.R.S.A. § 17852(3). Members who leave state service before obtaining 10 years of creditable service do not qualify for retirement benefits but are entitled to a return of the employee portion of the retirement contributions made on their behalf, plus interest. 5 M.R.S.A. § 17705(2).

As originally enacted, Maine's retirement statute contained no express statement relating to future statutory amendments. In 1975, however, the Legislature enacted a provision which, as most recently recodified, reads as follows:

> No amendment to this Part may cause any reduction in the amount of benefits which would be due to a member based on creditable service, earnable compensation, employee contributions, pick – up contributions and the provisions of this Part on the date immediately preceding the effective date of the amendment.

5 M.R.S.A. § 17801, *originally enacted by* Me. Laws 1975, ch. 622, § 6.

2. The Onset of the State's Budget Crisis

In the fall of 1990, as a result of a downturn in Maine's economy, the State's projected revenues were estimated to fall significantly below the amount necessary to maintain current services. Since Maine's Constitution requires the state to maintain a balanced budget, the Legislature responded at its First Regular Session in 1991 by making a number of budgetary cuts. Among those cuts were three changes to the benefit structure of the Retirement System ("the 1991 amendments"); these changes were made applicable only to those participants in the Retirement System who had seven or fewer years of creditable service (three fewer than the 10 years necessary to qualify for retirement benefits). The specific changes in question (1) increased the statutory retirement age from 60 to 62; (2) increased the penalty for early retirement from approximately 2.25 percent to six percent for each year preceding the retirement age of 62; and (3) eliminated the ability of a retiree to include payments for up to 30 days of unused sick time or vacation time in the calculation of a retiree's "average final compensation." *See* Me. Laws 1991, ch. 591, §§ EEE-3, EEE-7, EEE-8,

EEE-10. The relevant statutory provisions with respect to members of the Retirement System who had more than seven years of creditable service or who had already reached retirement age and were still in service with at least one year of creditable service remained unchanged.

Following the enactment of these provisions, a state court lawsuit challenging the constitutionality of the 1991 amendments under the Contracts Clause of the U.S. Constitution was brought on behalf of a class of state employees with seven or fewer years of creditable service. The lawsuit reached the Supreme Judicial Court of Maine in the late spring of 1993, and on June 23, 1993 that court issued a decision upholding the 1991 amendments against constitutional challenge. *Spiller v. State*, 627 A.2d 513 (Me.), *motion to file petition for certiorari out of time denied*, 510 U.S. 986 (1993). The court noted that Maine's retirement laws do not contain any "clear indication of a legislative intent to create immutable contract rights for all state employees." *Id.* at 516. In fact, it found that the relevant statutes compelled a contrary conclusion. The primary basis for the court's conclusion was the previously-quoted statement in 5 M.R.S.A. § 17801 that "no amendment to this Part may cause any reduction in the amount of benefits which would be due to a member . . . on the date immediately preceding the effective date of the amendment." The Maine Supreme Judicial Court held that this language "reserves to future legislatures the power to modify prospective [pension] benefits for employees to whom benefits are not then due." 627 A.2d at 516.

3. The 1993 Amendments

While the *Spiller* case was pending, the financial situation of the State was significantly worsening. As a result, the Maine Legislature was faced at its First Regular Session in 1993 with the necessity of effecting even more dramatic savings in governmental expenditures in order to balance the State's budget. Because the State's contributions for state employee and teacher retirement constituted one of the State's largest single expenditures, the Legislature again considered proposed amendments to the retirement statutes. On June 30, 1993, after the Maine Supreme Judicial Court had issued its decision in *Spiller*, the Legislature enacted six additional amendments (the "1993 amendments") with respect to retirement benefits as part of a much larger package of budget cuts and cost savings applicable to the state budget as a whole. *See* Me. Laws 1993, ch. 410.

The first three of the 1993 amendments simply extended the three changes made in 1991 (increase in statutory retirement age from 60 to 62, increase in early retirement penalty, and limitation on inclusion of unused sick and vacation time as "average final compensation") to all state employees and teachers who had not reached retirement age and who had fewer than 10 years of creditable service as of July 1, 1993. Me. Laws 1993, ch. 410, §§ L-12, L-34, L-35, L-38, *amending* 5 M.R.S.A. §§ 17001(13)(B), 17851(2-A), 17852(3-A). Previously, as noted above, these changes had been applicable only to state employees and teachers who had not reached retirement age and had seven or fewer years of creditable service. Extending these changes to state employees and teachers with fewer than 10 years of creditable service

did not affect any state employees or teachers who had met the years of service requirement as of the effective date of the 1993 amendments.

The other three amendments made prospective changes applicable to all participants in the Retirement System, including employees and teachers who had 10 or more years of creditable service and had therefore met the years of service requirement. The first of these changes was an increase from 6.5 percent to 7.65 percent in the amount that employees were required to contribute toward their future retirement benefits. Me. Laws 1993, ch. 410, § L-28, *enacting* 5 M.R.S.A. § 17701-B. The second was a limitation of five percent per year and a total of 10 percent over the highest three years in the maximum percentage by which an increase in salary in a member's three highest salary years could be included in the calculation of the member's service retirement benefit. Me. Laws 1993, ch. 410, § L-13, *amending* 5 M.R.S.A. § 17001(13)(C). The final change required that retirees be retired for at least 12 months before they could receive an annual cost of living increase, whereas they previously were required to wait only six months. Me. Laws 1993, ch. 410, § L-3, *amending* 5 M.R.S.A. § 17806(3).

4. Proceedings Below

Eleven months after the 1993 amendments became effective, petitioners, acting on behalf of a class consisting of all Maine public school teachers, filed this action in federal court challenging the constitutionality of all six of the 1993 amendments on a variety of grounds, including the Contracts Clause. Since three of the 1993 amendments

merely extended the 1991 amendments to all MSRS participants who had not yet satisfied the years of service requirement, petitioners in effect sought to relitigate the issues decided in *Spiller* as well as to challenge the three new changes that were instituted in 1993.

In a decision issued on August 1, 1996, the district court drew a distinction between those teachers who had satisfied the years in service requirement as of the effective date of the 1993 amendments – whose benefits it described as having "vested" – and those teachers who had not yet met the years of service requirement and who therefore had not qualified to receive a pension upon reaching the required age. Specifically, the district court held that the 1993 amendments violated the Contracts Clause only as applied to those members of the MSRS who had satisfied the years of service requirement as of the effective date of the 1993 amendments. App. at 35a-39a; 937 F.Supp. 46, 51-58 (D.Me. 1996).

Both parties appealed to the United States Court of Appeals for the First Circuit. Petitioners contended that the district court should have found that a contractual relationship existed from the beginning of employment and thereby invalidated the 1993 amendments in their entirety. Respondents argued that the district court had erred in invalidating the 1993 amendments as to those teachers who had satisfied the years of service requirement. The district court stayed its order pending appeal, acknowledging, *inter alia*, that its decision was inconsistent with the Maine Supreme Judicial Court's decision in *Spiller*. Order Granting Defendants' Motion to Stay, entered November 15, 1996 at 3-4.

The First Circuit, in an opinion issued on August 11, 1997, followed this Court's decisions in *National R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985) and *Dodge v. Board of Education*, 302 U.S. 74, 79 (1937), in holding that legislative enactments such as Maine's retirement statutes do not create contractual rights absent a clear indication that the Legislature intended to create a binding contract. Pet. App. 8a. In applying this rule to Maine's retirement statute, the First Circuit focused on 5 M.R.S.A. § 17801, which it found reflected the State's general intent to reserve the power to make changes with respect to the terms and conditions of the Retirement System while arguably creating contractual rights only with respect to any retirement benefits that were due on the date immediately preceding any statutory amendment. Pet. App. 14a.

> [T]he State's self-imposed limitation on its legislative power through section 17801 may reasonably serve as an indication of its intent to guarantee pension benefits once they are "due," as well as an obvious reservation of amendment powers with regard to the amount of benefits that are not "due."

Id.

Finding that the case therefore turned on the meaning of which benefits were "due," the First Circuit took into account the relevant statutory language, the decision of the Maine Supreme Court in *Spiller*, and the principle that statutes will not be found to create binding contractual rights absent a clear indication of legislative intent. Pet. App. 14a-17a. It concluded that section 17801 should be interpreted to protect those retirement benefits as to

which teachers had an immediate right to payment. Pet. App. 16a. Since the 1993 amendments did not alter any benefits as to which petitioners had a right to immediate payment, the First Circuit found that there had been no impairment of contractual rights.

In light of its ruling, the First Circuit did not reach a principal argument made by respondents below – that even if section 17801 were interpreted to protect the accrued retirement benefits of teachers who had satisfied the years of service requirement, the 1993 amendments should nevertheless be found valid because they did not impair any accrued benefits but instead merely altered prospectively certain terms and conditions with respect to the accrual and calculation of future benefits – a result permitted under 5 M.R.S.A. § 17801.

REASONS FOR DENYING THE WRIT

Petitioners contend that this Court should grant review to revisit its 1889 decision in *Pennie v. Reis*, 132 U.S. 464 (1889). Contrary to petitioners' arguments, however, the determination of when contractual rights exist under state statutes establishing state retirement systems is not controlled by *Pennie*, but by subsequent decisions culminating in *National R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry. Co.*, 470 U.S. 451 (1985). *Atchison, Topeka and Santa Fe* held that legislative enactments are not presumed to create contractual rights absent a clear indication that the Legislature intended to bind itself contractually; it further requires a detailed examination of the particular statute at issue to determine whether

there is a sufficiently clear intent to create a contractual relationship. The First Circuit was therefore entirely correct in determining that there is no "blanket answer" to the question of whether retirement statutes create contractual rights (Pet. App. 6a) and in evaluating the Maine retirement statute under the analysis set forth in *Atchison, Topeka and Santa Fe*. There is no need for this Court to revisit that issue.

Petitioners further argue that review is warranted here because of the diversity of approaches followed by state courts of last resort in considering whether contractual rights are created under state retirement statutes. The problem with this argument is that the diversity of approaches among state courts results either from differences in the relevant state statutes involved or from differences in state contract law itself. Contrary to petitioners' apparent belief, it is not this Court's role to harmonize the rulings of state courts of last resort on issues that are primarily based on state law.

On the second question presented in their petition, petitioners invite the Court to rule that the unmistakability doctrine does not apply in determining whether state retirement statutes create contractual rights. On this issue, petitioners do not contend that there are any conflicts among federal courts of appeal or state courts of last resort, but merely argue that the applicability of the unmistakability doctrine is an important question of federal law that should be settled by this Court. The short answer to this argument is that, notwithstanding petitioners' assertions, the unmistakability doctrine is squarely applicable in this case because Maine

was indisputably exercising its sovereign power to legislate on matters of state policy when it enacted the amendments to its retirement system that are at issue in this action. As a result, the First Circuit's application of the unmistakability doctrine in this case is fully consistent with *United States v. Winstar Corp.*, 116 S.Ct. 2432 (1996), and does not present an important issue of federal law calling for guidance from this Court.

As a corollary to their second question, petitioners also seek guidance as to whether the unmistakability doctrine restricts courts to an examination of the relevant statutory language or permits a broader inquiry into the circumstances surrounding the passage of the statute in question. This issue, however, is resolved by existing precedent. Indeed, the First Circuit expressly addressed the legislative history relied upon by petitioners but found that it did not clearly establish legislative intent to bind the State by contract in light of the language of the governing statute. Pet. App. 16a.

I. THE ESTABLISHMENT OF A CONTRACTUAL RELATIONSHIP

A. Applicable Supreme Court Precedent

Petitioners suggest that this Court should grant review in this case to revisit its decision in *Pennie v. Reis*, 132 U.S. 464 (1889), a precedent which petitioners describe as "obsolete" but "technically controlling." Pet. 10. At the outset, since the First Circuit noted the existence of *Pennie* but observed that it has been "ignored as precedent" (Pet. App. 10a), and since petitioners have not argued that *Pennie* has otherwise been judicially accorded

any controlling effect, one might well question whether this Court should grant certiorari to revisit a 109 year old decision that no longer appears to be given any independent weight as precedent. *See* R. Stern, E. Gressman, S. Shapiro, and K. Geller, *Supreme Court Practice*, § 4.4 at 172 (7th ed. 1993).

More importantly, *Pennie v. Reis* is not this Court's last word on the issue of whether pension legislation establishes a contractual relationship. Instead, guidance on that issue comes from subsequent decisions of this Court, most notably *Dodge v. Board of Education*, 302 U.S. 74 (1937), and *National R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry. Co.*, 470 U.S. 451 (1985).

Dodge is instructive because it involved a claim that an Illinois statute creating a teachers' retirement fund and specifically providing for a $1,500 annual payment upon retirement after 20 years of service created a contractual right that could not be impaired by subsequent legislation providing for only a $500 annual payment. In considering whether the Illinois statute governing teacher retirement created a contract, the Court stated as follows:

> In determining whether a law tenders a contract to a citizen, it is of first importance to examine the language of the statute . . . The presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be preserved until the Legislature shall ordain otherwise. . . .
>
> The Supreme Court of Illinois concluded that neither the language of the Miller law, nor the circumstances of its adoption, evinced an intent on the part of the Legislature to create a binding

> contract with the teachers of the State. While we are required to reach an independent judgment as to the existence and nature of the alleged contract, we give great weight to the views of the highest court of the State touching these matters.

302 U.S. at 78-79 (footnotes omitted).

The *Atchison, Topeka and Santa Fe* case, decided 48 years later, did not involve state pension legislation, but nevertheless reaffirmed the continuing vitality of the *Dodge* decision, noting that:

> [f]or many decades, this Court has maintained that, absent some clear indication that the legislature intends to bind itself contractually, the presumption is that "a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Dodge v. Board of Education*, 302 U.S. 74, 79 (1937). . . .
>
> This well-established presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of a state. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 104-05 (1938). Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body.

470 U.S. at 465-66. The Court in *Atchison, Topeka and Santa Fe* went on to reaffirm the principle that, in determining whether a particular statute gives rise to a contractual

obligation, the language of the statute is "of first importance." *Id., quoting Dodge*, 302 U.S. at 78.

The First Circuit correctly followed the *Atchison, Topeka and Santa Fe* decision in determining whether Maine's retirement statutes created any contractual rights that were impaired by the 1993 amendments. *See* Pet. App. 8a, 13a, 14a. To the extent that *Pennie v. Reis* is interpreted to hold that state statutes establishing retirement benefits can never create contractual rights,[1] *Pennie* has been superseded by the analysis set forth in *Atchison, Topeka and Santa Fe*, which does not foreclose the possibility that contract rights can be created but requires a clear showing that the Legislature intended to create such rights. There is absolutely no need for this Court to grant review in this case to revisit *Pennie*.

B. Conflicts Among State Courts of Last Resort and Federal Circuits

Petitioners also suggest that this Court should grant review to reconcile the diversity of approaches followed by state courts of last resort in considering whether contractual rights are created under state retirement statutes. Because this diversity either results from differences between the relevant state statutes or from differences in state contract law, petitioners' request that this Court

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[1] It is also possible to interpret *Pennie* as having found that no contractual relationship was created because nothing in the statute established such a relationship. *See* 302 U.S. at 471 ("there was no contract on the part of the state that its disposition should always continue as originally provided").

grant review in order to impose a "controlling analytical framework" (Pet. 16) is completely unwarranted.

At the outset, it is well-settled that although the determination of whether a contract exists for purposes of the Contracts Clause is ultimately an issue which federal courts are required to decide for themselves, that issue frequently requires examination of state law, *see, e.g., Appleby v. City of New York*, 271 U.S. 364, 380 (1926), and in those instances federal courts should "accord respectful consideration and great weight to the state's highest court." *General Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992).

Consistent with this approach, the court below evaluated the alleged existence of a contractual relationship under the federal standard set forth in the *Atchison, Topeka and Santa Fe* case and also gave appropriate weight to the decision of the Maine Supreme Judicial Court in *Spiller v. State*, 627 A.2d 513 (Me. 1993). *See* Pet. App. 15a-16a. In this respect, the First Circuit's approach was essentially identical to that followed by the Second Circuit in *Pineman v. Fallon*, 842 F.2d 598, 600-01 (2d Cir.), *aff'g* 662 F.Supp. 1311, 1315-17 (D.Conn. 1987), *cert. denied*, 488 U.S. 824 (1988) (agreeing with Connecticut Supreme Court that state retirement statute did not create contractual rights that had been impaired by subsequent amendment). In *Kestler v. Board of Trustees*, 48 F.3d 800 (4th Cir.), *cert. denied*, 116 S.Ct. 186 (1995), the Fourth Circuit similarly relied upon its reading of state court decisions in holding that the North Carolina retirement statutes had

not created any contractual rights that were impaired by subsequent legislation.[2]

In contrast, in *State of Nevada Employees Assn. v. Keating*, 903 F.2d 1223 (9th Cir.), *cert. denied*, 498 U.S. 999 (1990), the Ninth Circuit found that the Nevada retirement statute did create contract rights that were impaired by subsequent legislation terminating the right of employees to withdraw their pension contributions without penalty. It did so, however, only after noting that the State of Nevada had not contested that the retirement statute created contractual obligations and that the Nevada Supreme Court had expressly held that, upon entering the state work force, state employees had contractual retirement rights that could only be legislatively altered if any disadvantage to employees were accompanied by corresponding new advantages. 903 F.2d at 1224-25, citing *Public Employees' Retirement Board v. Washoe County*, 615 P.2d 972 (Nev. 1980).

Thus, the relevant caselaw from the federal circuits is consistent with the principle that (1) as a matter of federal law, the *Atchison, Topeka and Santa Fe* analysis governs the determination of whether retirement statutes create contract rights, but (2) nothing prevents states from creating greater contract rights with respect to retirement benefits – either through state legislative action or as a matter of state contract law as interpreted

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[2] In the *Kestler* case, the Fourth Circuit did not expressly discuss the *Atchison, Topeka and Santa Fe* standard, but there is no indication in the facts of that case that the North Carolina retirement statute in question contained any language evidencing an intent to create a binding contract.

by state courts of last resort. As petitioners note, a number of states have recognized broader contractual rights, even though, as the *Spiller* case demonstrates, Maine has not chosen to restrict its legislative power in this manner.

In sum, the diversity of judicial decisions noted by petitioners with respect to the creation of contractual rights by state retirement statutes is not surprising and is attributable to two causes. The first, as the First Circuit suggested (Pet. App. 13a) and as petitioners acknowledge (Pet. 15), is that there are differences between the relevant state statutes and the intent of the state legislatures that enacted them. The second is that there are differences between the manner in which state courts of last resort have chosen to interpret the contract law of their respective states. Such differences do not constitute a basis for this Court to grant certiorari since it is not this Court's role to harmonize the rulings of state courts on issues that are primarily based on state law.

C. Dispositive Issue in this Case is Unique to Maine

Certiorari is not warranted in this case for another reason as well – because under virtually any theory, the interpretation of 5 M.R.S.A. § 17801 is central to the case. To our knowledge, this provision is unique to Maine's retirement statute. As a result, any ruling in this case by this Court would not be likely to provide useful guidance to state and lower federal courts elsewhere in the nation.

Thus, if this Court were to consider whether contract rights exist under the Maine retirement statutes prior to retirement, it would not be relieved from addressing the

effect of section 17801, since that section only precludes reductions of amounts that are "due" and cannot reasonably be interpreted as a promise never to alter the retirement statutes in any manner. Indeed, although this issue was not reached by the First Circuit, respondents argued below that, even if section 17801 were interpreted to provide contractual protection to employees and teachers prior to retirement, that protection would still only apply to benefits that were "due" (i.e., had already been accrued) and would not preclude the Maine Legislature from making changes that were applicable prospectively to existing participants in the system so long as those changes did not reduce accrued benefits. Respondents further argued that under this theory, while more drastic forms of legislative revision might not be valid, the specific amendments made in 1993 would still withstand constitutional challenge.[3]

What this demonstrates is that an answer to the broad and rather abstract question posed by petitioners is

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[3] Specifically, Respondents argued below that the 1993 amendments affecting employees and teachers who had not yet met the years of service requirement could not be found invalid because those participants had not qualified for any pension and therefore had no accrued benefits. In addition, respondents argued that the 1993 amendments affecting participants who had met the years of service requirement could also be sustained because those amendments did not reduce any accrued benefits, but instead made only prospective (and relatively modest) changes with respect to the accrual of future benefits. By way of example, the 1.15% increase in employee contributions was prospective only; it did not affect years of creditable service previously earned, but required increased payments to earn creditable service in the future.

not likely to dispose of the case, which will still turn on the interpretation of section 17801. Whether or not the First Circuit erred in interpreting section 17801 and, if so, how section 17801 should correctly be interpreted are issues that are unique to Maine's retirement statute and that do not warrant review by this Court.

II. THE UNMISTAKABILITY DOCTRINE

A. Applicability to State Retirement Systems

In support of the second question contained in their petition, petitioners contend that the unmistakability doctrine should not be applied to state retirement systems, and that this is an important issue of federal law that should be resolved by this Court. Petition at 16-18. Petitioners' arguments on this issue do not withstand scrutiny.

Initially, petitioners seek to derive support for the proposition that the unmistakability doctrine should not be applied to retirement statutes from this Court's decision in *United States v. Winstar Corp.*, 116 S.Ct. 2432 (1996). According to petitioners, *Winstar* limited the applicability of the unmistakability doctrine to instances where enforcement of contractual obligations would block a "sovereign power" of the government. They then contend that, in establishing state retirement systems, states are not exercising sovereign power. Pet. 17-18.

At the outset, it bears emphasis that *Winstar* involved a case where there was no doubt that a contractual relationship existed – the government had entered into a written contract, and the issue was whether it could alter

that contract through subsequent legislation. In contrast, this case involves a somewhat different issue – whether, where no written contract exists, a statute should be construed as itself creating a contractual relationship. The latter question, respondents submit, may be governed more directly by *Atchison, Topeka and Santa Fe* than by *Winstar*.

More fundamentally, however, what petitioners overlook is that Maine established its retirement system through legislation and what is at issue in this case is Maine's ability to modify and revise its retirement statute by a further exercise of legislative power. The exercise of legislative power has uniformly been found to constitute a sovereign governmental act. *E.g., Winstar,* 116 S.Ct. at 2453-54 (plurality opinion); *id.* at 2477 (Scalia, J., concurring). *See Atchison, Topeka and Santa Fe,* 470 U.S. at 406 (legislative policies "are inherently subject to revision and repeal and to construe laws as contracts would be to limit drastically the essential powers of a legislative body").

Although the *Winstar* case produced multiple opinions, all of those opinions are consistent with the proposition that the unmistakability doctrine applies to any exercise of a sovereign's legislative power. Thus, the plurality found the unmistakability doctrine inapplicable only after emphasizing that the government had not been precluded from exercising its sovereign power to enact legislation applicable to thrift institutions as a whole but was instead only required to indemnify those particular thrift institutions with whom it had previously contracted. 116 S.Ct. at 2458. The concurring opinion found the unmistakability doctrine squarely applicable, *id.* at 2477

(Scalia, J.) (noting that the legislative enactment at issue was "an unquestionably sovereign act of government"), but found that the doctrine had been satisfied because the government had made an unmistakable promise to the thrift institutions in question. *Id.* at 2478. And the dissent argued both that the unmistakability doctrine was applicable and that it foreclosed the thrift institutions' claims. *Id.* at 2479-82 (Rehnquist, C.J., dissenting).

Simply stated, petitioners in this case are seeking to use the Contracts Clause to deny to the State of Maine its ability to exercise its legislative power to amend its retirement statutes. In the circumstances of this case, the First Circuit's application of the unmistakability doctrine was entirely consistent with *Winstar* and with prior precedent concerning the unmistakability doctrine. *E.g., United States v. Cherokee Nation*, 480 U.S. 700 (1987); *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986).

Petitioners also seek to draw a distinction between government acting in its capacity as an employer and government acting in its capacity as sovereign. *See* Pet. 17 ("where . . . government is acting in its capacity as an employer, it is not exercising sovereign powers"). The first problem with this argument is that petitioners have apparently overlooked the fact that the State does not have an employment relationship with the petitioners in this case or the class of public school teachers whom they represent. Petitioners are the employees of local school districts, not the State, and the State's payment of the employers' share of petitioners' pension contributions results not from an employment relationship but from a

legislative policy choice to support primary and secondary school education. Moreover, while petitioners cite several cases that draw a distinction between government acting as an employer and government acting as a sovereign, those cases were decided in the context of the First Amendment and the double jeopardy clause and have no relevance here.[4] In any event, it is difficult to understand petitioners' reliance on those cases because they stand for the proposition that when the government is acting as an employer, it is freed from certain of the constitutional constraints that apply to its acts as sovereign.

In sum, none of the arguments advanced by petitioners even remotely support the conclusion that the applicability of the unmistakability doctrine to state retirement statutes presents an important federal issue that needs to be addressed by this Court.

B. Inquiry into History, Purpose, and Circumstances

Petitioners' final argument is that this Court should grant review to resolve the issue of whether analysis under the unmistakability doctrine is limited to the statutory language or whether it permits consideration of a statute's history, purpose, and circumstances. This issue has long since been resolved. The decisions of this Court establish beyond dispute that courts should look both to

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[4] *See* Pet. 17, citing *Waters v. Churchill*, 511 U.S. 661 (1994) (First Amendment); *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (same); *United States v. McAllister*, 119 F.3d 198 (2d Cir. 1997) (double jeopardy); *United States v. Reyes*, 87 F.3d 676 (5th Cir. 1996) (same).

the statutory language and the circumstances of enactment – i.e., the relevant legislative history – in determining whether the Legislature intended to bind itself by creating contractual rights. *E.g., Atchison, Topeka and Santa Fe,* 470 U.S. at 468, 470 (considering language of statute and "circumstances surrounding its passage"); *Dodge v. Board of Education,* 302 U.S. at 79 (considering language of statute and "circumstances of its adoption").

Petitioners further argue that the First Circuit erred because it focused solely on statutory language in applying the unmistakability doctrine (Pet. 18), but this is demonstrably untrue. The First Circuit expressly acknowledged the existence of certain legislative history that had been noted by the district court and that had been "vigorously argued" by petitioners on appeal. Pet. App. 16a. In the end, however, the First Circuit, in keeping with the precept that the statutory language is "of first importance," *Atchison, Topeka and Santa Fe,* 470 U.S. at 466, did not find that the legislative history relied upon by petitioners was sufficient to supply the clear evidence of contractual intent missing in the statute. Pet. App. 16a. We submit that this finding by the First Circuit was correct. In any event, it does not present an issue requiring review by this Court.[5]

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[5] In the proceedings below, there was also a disagreement between petitioners and respondents as to whether certain of the evidence proffered by petitioners constituted cognizable legislative history. Although agreeing that legislative history could generally be considered, respondents urged the courts below to disregard certain materials submitted by petitioners on

CONCLUSION

The petiton for a writ of certiorari should be denied.

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Respectfully submitted,

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the principle that legislative intent can be determined only by the text of the statute and its contemporaneous legislative history, not by "post hoc statements of interested onlookers." *E.g., Western Airlines v. Board of Equalization*, 480 U.S. 123, 131 n. (1987). To the extent that petitioners are now seeking to revive their claim that these materials should have been considered, this issue does not present an important issue of federal law or an issue that would have any applicability outside the confines of this case.